**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**APPELATE JURISDICTION**

**CRIMINAL APPEAL NO. 585 OF** 1999.

Harikantrai Shrinikhedi Yadav,
Age- 23 yrs., R/o.Ambad Shivar,
C/o- Dattu Gopal Datir,
Room No. Near ShriKrishna Nagar,
Nashik(Presently undergoing
setence in the Central Prison,
Nashik Road, Nashik.) .. APPELLANT.

VERSUS.

The State of Maharashtra
(Ambad Police Station,Nashik) .. RESPONDENT.

Mr.Naveen Chomal, advocate for the appellant.
Smt. V.R.Bhosale, APP for the respondent.

**CORAM: S.B.MHASE &**
**ANOOP V. MOHTA,JJ.**

**DATE : DECEMBER 23, 2004.**

Oral Judgment (Per S.B.MHASE,J.)

1. This appeal is directed against the conviction of the appellant for an offence punishable under section 302 of the Indian Penal Code, sentencing him for life imprisonment and a fine of Rs.1,000/-, in default to undergo simple imprisonment for three months in Sessions Case No.9 of 1999 decided by the Second Additional Sessions Judge, Nasik on 21.8.1999.

2. The accused-appellant was charged for an offence punishable under section 302 of the Indian Penal Code for committing the murder of his wife - Nutan on 28.7.1998 at about 3.00a.m. at Ambad Shivar in Room No. 2 in the chal constructed and owned by Dattu Gopal Datir, Nasik. It is the case of the prosecution that the accused caused the death of his wife-Nutankumari by assaulting her by a piece of tiles on her head and then pouring kerosene on her person and setting her on fire.

. In order to prove the guilt of the accused, the prosecution has examined in all seven witnesses. PW.-6 Suresh Nehe is the police constable who visited the spot immediately after the incidence had taken place and had sent the dead-body for post-mortem and had lodged the First Information Report (Exhibit-22). He has also prepared the Inquest Panchnama and Panchnama of the seen of offence, which are at Exhibit 6 & 12. Both these panchnamas were being exhibited since they were not objected by the defence. "Exhibit-8" is the Arrest Panchnama. It was also not objected by the defence. Pw.-7 Bhika Mankar is PSI, Control Room, Nasik. He had registered the crime on getting a complaint from Pw.-6 and has further carried out the investigation

and has filed the charge-sheet in the case. Pw.-5 Dr.Milind Kaushik has carried out the post mortem on the dead body of the deceased Nutankumari. Pw.4 Dattu Gopal Datir is the owner of the chawl wherein the deceased and accused were residing as a tenant. Pw.4 had immediately came to the spot of the incidence.

3. Pw.-1 to 3 are the neighbours of the appellant who were residing in the vicinity and close to the said place of the incidence. Pw.-2 Vaijayanti and Pw.-3 Chhotelal are husband and wife. They were residing at a distance of 500 feet from the house of the appellant. Pw.3 Chhotelal had helped the accused in getting employment. The appellant- accused appears to be from Bihar and his wife - deceased Nutankumari was also from Bihar. She had come to reside with the appellant some six months prior to the date of the incident and she used to come to the house of the Pw.2 & 3 for watching television. On the day of the incidence, at about 9.00p.m., the deceased Nutankumari had been to the house of the Pw.2 & 3 for watching television. She had also applied Mehendi on that day, since it was a day earlier to "Nagpanchami". At about 10.45p.m., both these witnesses have stated, the accused had been to

their house, and at 11.00p.m. the accused and the deceased Nutan left their house.

. It is further revealed from their testimony that at about 2.00a.m. accused came shouting that his wife was burning. Pw.2 has stated that on being informed she asked him (accused) why he had come to her instead of extinguishing fire. She further stated that the accused was trying to sit in their house, Pw.2 pushed him out of the house and then Pw.2 had also gone to the house of the accused and deceased. Other witness, namely, Dattu (Pw.4) and Surendra (Pw.1) were present. Pw.3 Chhotelal has corroborated his wife by stating that the accused came to his house knocking the door and shouted. Pw.3 opened the door and accused informed that his wife was burning. Upon which, he asked him to go and save her. Pw.3 has further stated that initially his wife-Vaijaynti had gone to the place of the incidence and when she returned back, Pw.3 had gone to the place of the incidence.

. The testimony of these two witnesses corroborates each other and it establishes a fact that till 11.00p.m., in the said night, the deceased-Nutankumari was at the house of these two witnesses

and the accused had come to their house and had taken the deceased along with him to his house where the incidence has taken place. It further establishes a fact that at about 2.00a.m. the accused had been to the house of the Pw.2 & 3 and knocked their door and upon opening the door they were infomred by the accused that his wife was burning, both of them asked him to save the wife. However, the accused was trying to sit in their house. They pushed him out of the house thereafter the accused had gone to the seen of offence.

4. So far as Pw.3 is concerned, no material has been brought on record in cross-examination to disbelieve Pw.3. So far as Pw.2 is concerned, initially an attempt was made to demonstrate that Pw.2 does not understand the watch. However, at the end of cross-examination, Pw.2 was asked to read the clock in the court hall and the Pw.2 has stated it to be 2.00 O'clock. The Sessions Judge has observed in his judgment that it was a correct reading of the clock.

5. The other contradiction which was tried to be brought on record in the testimony of the Pw.2 is in respect of the statement that the witness has

reported to the police that the accused informed that "his wife was burning" instead in the police statement it is stated that "his wife was burnt". ("Jal Rahi Hai" and "Jal Gayi Hai".) However, we agree with the Sessions Judge that this is not a material contradiction so as to discard her testimony. Therefore, we find that the Sessions Judge has rightly relied on these witnesses and has accepted their testimony.

6. PW-1 Surendrasing is an immediate neighbour of the accused-appellant. He has stated that at 2.30 a.m. he saw smoke coming into his house. He woke up and found that smoke was coming from the house of the accused and the door of his house was slightly open. He saw that the house had caught fire, he immediately went to the landlord Dattu Datir(PW-4), to inform this fact (Datir's house is located at a distance of 200 feet away) and then both of them (PW- 1 & 4) came to the spot of incidence. PW-1 has stated that he found that the accused was inside the house with his wife who had caught fire and he was extinguishing fire with the help of gunny bag. She had died. The landlord informed to the police on telephone and the police came. This witness has further stated about the inquest panchanama and the panchanama of the seen

of offence. This witness has stated that he had noticed that when the smoke was coming from the house of the accused he smelt the foul smell of the burnt mutton and burning of kerosene. Nothing was found in the cross-examination of this witness so as to disbelieve him.

7. PW-4 has corroborated PW-1 by stating that PW-1 informed him at about 2.00 to 2.30 a.m. that the smoke was coming from the adjoining room and something had happened, therefore, he alongwith his son and PW-1 went to the spot and found that the Nutankumari was burning in her room. He further found that the accused was coming raising shouts from the house of the Yadav's family PW-2 & 3. As it was an extensive flame, PW-4 had not entered in the house. However, the accused entered the house and covered his wife with a quilt(Godhadi). Thus, from the testimony of these two witnesses, it is clearly established that the accused was present at the said time of the incidence. He was coming from the house of Yadav PW-2 & 3. Thus, the testimony of these witnesses corroborated the testimony of Yadav that the accused had tried to extinguish the fire.

8. The PW-5, Medical Officer has carried out

post-mortem on the dead body and has found that there were 100% burns. On internal examination, he found that head was deeply burnt, there was bruise on left frontal area admeasuring 2 x 2 cm.. 5 cm. behind frontal enunance. Vital reaction present clot adherent. While examining skull, he found depressed outer table at left frontal region. The bruise caused to the head is corresponding to the injury.

On examining brain, he found extra dural haematoma over left frontal region corresponding to skull injury. The haematoma was admeasuring 4 x 4 cms. It was adherent to meneges. It was radish and laminated. The cause of death given by the Doctor was shock due to 100% burns with scalp bruise with left frontal outer table depression with extra dural haematoma. This witness has opined that if hard and blunt object is hit in the head such a type of injury is possible, this injury is possible by a hit of a piece of a tile like article No.5. Thus, from the testimony of this witness it is revealed that the death was caused because of the injury on the head which has caused injury to the scalp and brain, as stated above resulting into extra dural haematoma and additional 100% burns. This shows that in order that the deceased Nutankumari should not try to save her life and should not shout to call for help and

equally should not try to run away, initially a blow of tile was given on frontal region of the head and thereafter, kerosene has been poured, more specifically on portion of the head and she was set on fire.

. It has been brought on record that the injury on head is possible if the person falls on blunt object like peg. It has been further brought on record that no pathological examination has been carried out to find out whether there had been infiltration of blood into subcutaneous tissues so as to justify that heamatoma is the result of the injury and fall on blunt object with the rupture of capillaries due to burns or hit. However, still the fact remains as to whether the deceased was of the poor physical condition so as to have bruise as a result of fall and answer to this is no. No material has been brought on record to show that the deceased Nutankumari had a poor physical condition. Therefore, the cross-examination of the medical officer does not help in any way to the defence. Ultimately, the Doctor's evidence shows that there was an injury on head which caused an internal injury to the skull and brain and equally 100% burn injuries. In the light of this, if we take into

consideration the defence of the accused, the defence is improbable.

9. According to the accused, on the day of the incidence, he had brought the wife from the house of the PW-2 & 3, thereafter accused went to the house of one of his colleague but the accused returned home at late night. He found that the door was open to some extent and the wife Nutankumari was on her blaze. Flames were on her person. On seeing that he was afraid. He immediately went to PW-3 and told him about the incidence and then, PW-2 & 3 and he himself came back to the house and extinguished the fire on the person of deceased. Thus, according to the accused when the fire had taken place, the accused was not in house. However, in that eventuality the door would not have been open because it was late night at 2.00 to 2.30 a.m. and therefore, no woman who had come for residing with the husband, some 6 months earlier would keep doors open and sleep.

10. It is further more important to note that accused has not disclosed the name of his colleague with whom the accused was on that night at late night nor the accused has examined that colleague to establish the fact that at the relevant time, at 2.00

a.m., he was with him. Therefore, the only possible inference follows is that after he (the accused) had taken Nutankumari from the house of Yadav, at about 11.00 p.m., they both were in the house and the deceased was in the custody of the accused as his wife. Therefore, explanation offered by the accused, namely, that he was not in the house when the fire had taken up the deceased; is not an acceptable proposition.

11. The another explanation offered, taking clue from the cross-examinations of the witness Surendrasing (PW-1) and Dattu (PW-4) that in one of the corners of the said room there was a lamp(Samai) burning before the Goddess and as a result of which fire must have taken up. It is to be noted that the room is only obtained on tenancy and having roof at 6 feet. Even if in one of the corners of the said room, there was a small place for taking bath, it is not revealed from the spot panchanama that there was any place for keeping God and burning lamp continuously. Therefore, the theory of the lamp burning before the God which would have caused burn injuries is absolutely imaginary one. The said explanation is offered by the accused under section 313 of Cr.P.C.

12. The learned counsel for the appellant tried to rely upon the above circumstance and tried to persuade us that the accused is not guilty. On the contrary, we have scrutinised the submissions made by the learned counsel as stated above. The learned counsel then relied upon **2001(6) SCC 407, Arvind Singh V/s State of Bihar** and submitted that even though the husband being a companion, is supposed to explain circumstances of his wife's death, but initial burden remains on prosecution to prove the guilt of the husband and the prosecution has to discharge the same beyond reasonable doubt. Unless the initial burden is discharged, husband's conviction is not sustainable. But we find, on perusal of the said judgment that in the present matter, as discussed above, the prosecution has discharged initial burden and has proved the case beyond reasonable doubt, since it was established that he (the accused) was a companion with the deceased-wife on that night and the death was caused because of the injury on head and 100% burns. The injury on head is of such a type that it would independently cause a person unconscious thereby facilitating burning. Here it is pertinent to note that even if it is assumed for a sake of moment that

when the accused came at night from his colleague's house then his first reaction would have been to try to extinguish the fire and to save her. He could have immediately called the neighbours because it was a chawl of 18 rooms which were of 10 x 10 feet each. Therefore, an immediate help could have been availed from the neighbours by making hue and cry. However, the accused has not done that, instead he went to the house of PW-2 & 3 which was at a distance of 500 feet, in between which one housing society intervenes. After going and informing PW-2 & 3 he was trying to sit in their house. It is PW 2 & 3 who have pushed him out of the house, asking him to extinguish the fire first and save the wife. Thus, the conduct of the accused is not in consonance with the innocence. But it is a behaviour of the guilty person. He wanted to see that his wife is burnt and, therefore, instead of saving her life he ran to the house of PW-2 & 3 so as to simply creat evidence that he was not responsible for causing fire to her. The natural conduct of the ordinary prudent man is to take immediate steps to save life of the burning-dying wife. In that duty the accused has failed.

13. Thus, what we find is that taking the case

from any angle or view the prosecution has established its case beyond reasonable doubt to explain as to how the incidence has taken place while the deceased was in his company at that night. The said burden has not been destroyed by the accused-appellant.

14. The learned counsel for the appellant has stated that PW-1 Surendrasingh has stated that when he returned with PW-4 and his son, the accused was found extinguishing fire, however, she was dead. This circumstance shows the innocence on the part of the accused, as he had tried to extinguish the fire. However, this does not help the defence because at that time, the accused has returned from the house of PW-2 & 3, at their instance that he (accused) should save life of the wife first. PW-4 has also stated that when PW-4 and PW-1 came to the spot, he has seen the accused coming from the house of the PW-2 & 3, thereafter he tried to extinguish the fire. Therefore, the act of extinguishing fire was not an immediate act on the part of the accused. On the contrary, the accused wanted to creat an evidence of it and therefore, collected the presence PW-2 & 3. What we find is that at the time when the accused was extinguishing fire, everything was over and it was

simplicitor a dead body. That circumstance does not help the accused in any way so as to get the acquittal.

. Learned counsel tried to persuade us that this circumstance may be taken into consideration to minimise the sentence imposed on the accused-appellant from under section 302 into section 304(II) of the Indian Penal Code and the punishment may be reduced. We refuse to accept the said submission. We have found that initially the deceased was made unconscious by giving a blow on head and she was set on fire at about 2.30a.m.. Without proper explanation, we are not inclined to grant any benefit, as prayed by the learned counsel. This is an intentional act of committing murder of wife. It is not that initially he wanted to set her on fire but repented immediately and he tried to extinguish fire and in that process he himself substantially got burnt; the accused person has not sustained a single injury on his person. Therefore, we do not find that he is entitled to any benefit under section 304(II) instead of Section 302 of the IPC. In the result, the appeal fails and it is hereby dismissed.

**(ANOOP V. MOHTA,J.)** **(S.B.MHASE, J.)**